Labor Arbitration Awards: 1986 - Present, UNITE HERE and Centaur Acquisition, LLC d/b/a Horseshoe Indianapolis., 24-1 ARB ¶8317, (Oct. 13, 2023)

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24-1 ARB ¶8317. LEE HORNBERGER, Arbitrator. Selected by the parties. Case No. FMCS 230504-05806. Hearing held in Shelbyville, Indiana, September 1, 2023. Post-hearing briefs filed by October 2, 2023. Award issued October 13, 2023.

Headnote

Rights, union: Operations: Access.–
A union filed a grievance contending that the employer violated the collective bargaining agreement by limiting the days of the week and hours of the day that union representatives were allowed to access nonpublic areas within the casino. The arbitrator sustained the grievance. The employer placed a restriction that a union rep could visit nonpublic areas only when accompanied by an HR rep, which limited visiting hours only to when HR was in the office. The CBA, however, neither limited the days/hours of access nor authorized the employer to limit the rights, including by limiting the one accompanying the union rep to an HR rep. The CBA does require the union to notify the employer if a union rep is visiting nonpublic areas of the casino, but it does not require that the notice be to HR. The arbitrator, therefore, ordered that the employer cease and desist from limiting the days/hours of visits.

Brian R. Garrison, Attorney, for the Employer. Kristin L. Martin, Attorney, for the Union.

[Text of Award]

DECISION AND AWARD

INTRODUCTION

HORNBERGER, Arbitrator: This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between UNITE HERE (Union) and Centaur Acquisition, LLC, d/b/a Horseshoe Indianapolis (Employer). The Union contends that the Employer violated CBA Art. 4.02 (a) by limiting the Union's access to certain days of the week and times of the day; and (b) by requiring the Union to arrange for an off-duty employee to escort the Union representative.

The Employer maintains that it did not violate the CBA by (a) limiting the days of the week and hours of the day that Union representatives may access nonpublic areas of the Casino; and (b) denying representatives of the Union access unless accompanied by an off-duty employee.

Pursuant to the procedures of the Federal Mediation and Conciliation Service, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on September 1, 2023, in Shelbyville, Indiana, via Zoom. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for introduction of relevant exhibits. The dispute was deemed submitted on October 2, 2023, the date the post-hearing submissions were received.

The parties stipulated that the Grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

The advocates did an excellent job of presenting their respective cases.

ISSUE

The Union framed the issue as:

Is the Employer in violation of CBA Art. 4.02 by (a) limiting the days of the week and hours of the day that Union representatives may exercise their right under Art. 4.02 to access nonpublic areas of the Casino; and (b) denying representatives of the Union access unless accompanied by an off-duty employee?

If so, what is the appropriate remedy?

The Employer framed the issue as:

Has the Union met its burden to prove that the Employer violated CBA Art. 4.02 of the parties' CBA"?

The parties did not agree upon the wording of the issue, and the parties agreed that I had the authority to frame the issue.

I frame the issue as:

Did the Employer violate CBA Art. 4.02 (a) by limiting the Union's access to certain days of the week and times of the day; and (b) by requiring the Union to arrange for an off-duty employee to escort the Union representative.

RELEVANT CONTRACTUAL LANGUAGE

A. *ARTICLE 4: COUNCIL REPRESENTATIVES*

> ***4.01. Council Representatives.***
>
> The Union shall have the right to designate any employee as a Union Steward in any department or any shift employing its members. The Union will notify the Employer in writing of the designation or removal of any Stewards. Union business, including grievance handling, shall be conducted by Union members, employees, and Stewards on their own time or at mutually agreeable times and places. This is not meant to preclude the Steward from bringing an alleged violation of this Agreement to a supervisor's attention prior to the alleged violation occurring or as the alleged violation occurs. The activities of the Steward shall not interfere with the performance of their work for, or the operation of, the Employer. Stewards shall be subject to the same direction and control as other employees and shall be entitled to no preference as to any term or condition of employment on account of their position as a Steward. Shop stewards shall be scheduled to be off without pay or take paid time off to attend Union meetings, providing that at least two (2) weeks advance notice has been given of the meeting date to the Employer's designated representative. The Employer shall in good faith consider Union request to schedule other Bargaining Unit Employers for such Union meetings.
>
> ***4.02. Access to Employer Property*.**
>
> Authorized representatives of each Union shall have the right to visit the employer's establishment for the purpose of communicating with bargaining unit employees and supervisors regarding Union business and collecting Union dues, assessments, initiation fees, and other fees. Such visits shall not interfere with the operation of Employer's business or the performance of work by employees during their working time.

(a) *Visitation Rights.* Each Union shall designate in writing to the Employer the names of the authorized representatives who may exercise the Union's visitation rights.

(b) *Designated Areas.* The designated Union Representatives shall have access to areas where bargaining unit employees are working for the purpose of observing matters relevant to the investigation of grievances. The designated Union Representative shall also have access to the employee cafeterias and break areas in order to conduct Union business.

(c) *Work Interference.* Access shall not interfere with the work of any employee or guest's activities or otherwise disrupt the Employer's operations.

(d) *Sign In.* Council Representatives when preapproved by the Company shall be furnished ID badges that grant them access to Employer property for the purposes of contacting bargaining unit employees. Approved Council Representatives shall wear the ID badges while on the premises of the Employer. Approval of Council Representatives for furnishing of ID badges shall not be unreasonably denied. The Employer reserves the right to revoke such badges. The Employer shall not unreasonably revoke ID badges.

If a Council Representative has their ID badge revoked, the Council Representative shall be required to report to a designated office, sign in, and wear appropriate identification while on the premises of the Employer. In the event the designated office is not open, the Council Representative shall contact the security shift supervisor.

B. *ARTICLE 18: GRIEVANCES AND ARBITRATION*

18.03. Procedure for Adjusting Grievances.

All grievances shall be adjusted exclusively in the following manner: …

The decision of any arbitrator shall be final and binding upon the parties. An arbitrator shall only have the power and authority to interpret and apply the provisions of this Agreement to the grievance presented, and his decision shall apply only to the issue arising out of the facts of such grievance. The arbitrator shall have no authority to alter, amend, modify, nullify, ignore or add to the provisions of this Agreement either by implication or otherwise. ….

REVIEW OF THE FACTUAL PRESENTATIONS

Background

The Employer operates the Horseshoe Indianapolis Casino (Horseshoe) in Shelbyville, Indiana. The Employer and the Union have a CBA at Horseshoe.

There is a different Casino at a different location in Indiana called Southern. The Union has a CBA at Southern. Southern has no relationship or connection with Horseshoe. The Southern CBA has nothing to do with the Horseshoe CBA.

This is the first CBA between the Union and the Employer at Horseshoe. There is language in that CBA about Union access to Employer premises at Horseshoe. A difference of opinion has arisen about some aspects of that Union access CBA provision. The case before me concerns issues relating to such Union access.

Participants

[A] is the Local Union President.

International Union Vice-President and Business Agent [B] has worked for the International Union for approximately 23 years.

Employer Regional Compliance Director [C] has worked at Horseshoe for seven years.

HR Manager [D] has been employed with Horseshoe since October 2015.

Review of witness testimony

Local Union President [A]

Local Union President [A] is an Organizer and President with the Union. She has been employed by Southern since November 12, 1998. She has been a paid Organizer with the Union since January 2023. She is presently on LOA from work at Southern. As an Organizer, she has both the Southern and the Horseshoe properties. At Horseshoe, there are front-of-the-house employees. These are the employees who are directly in front of the guests. There are cooks and stewards. There are food and beverage employees. Ms. [A] talks with the employees. At Horseshoe there are a breakroom and a hallway. There are areas where customers cannot be.

At Horseshoe, the Union has to send an email ahead of time providing the day and time of the prospective visit. There are HR and multiple people involved. There has to be prior notification. One goes to the employee entrance. HR has to be buzzed. There is a security station. There is a check-in. The Union representative gives an ID and gets a temporary pass. HR is contacted. The primary point of contact is HR. If the Representative has an escort, the Representative is let in. The escort can be an employee of Horseshoe. One tries to find an escort who is off the clock. If there is no escort, Ms. [A] cannot get to a breakroom. She cannot go to Horseshoe on Saturday or Sunday or outside of the 8:30 a.m. to 4:30 p.m. first shift work hours.

The Union wants to go to the Casino on off hours and days. Many unit employees work during these hours.

Ms. [A] first sought access to Horseshoe as an Organizer in February 2023. She set up a “meet and greet” with HR. Ux. 5 and 6. There were notification emails.

There is a form that Ms. [A] has to fill out when she goes to Horseshoe. Ux. 7. Ms. [A] does not know what the access protocols were before February 2023.

She was told that IGC says an escort is required. At times the HR person serves as an escort.

At Horseshoe, there is a “smoke shack” break room outside. No protocols are needed for a meeting at the smoke shack. Not all of the employees use the smoking area. There is a shelter at the smoking area. One has to walk in the open to get to the shelter area.

At Horseshoe, there are Orientation Days. There is an HR escort to orientation sessions. An escort is needed for the Union representative to go to the restroom. An escort is not needed right at the table talking with employees.

On April 14, 2023, the Union filed a Grievance which states:

> It is the Council's position that under article 4.02 of our contract, it is the Company's responsibility to provide us with a badge and allow access to conduct union business. By restricting the times that we are allowed to be on property and forcing us to provide our own escort, the Company is interfering with our right to access. In addition, IGC Title 68 mentions no limits for days or times of visits. Jx. 2.
>
> The Employer denied the Grievance, stating:
>
> After reviewing the document with Caesars corporate VP of Labor Strategy and our Regional Compliance Director, Horseshoe Indianapolis needs to follow the ICG regulations and guidelines.
>
> Attached is the communication from the Indiana Gaming Commission pursuant to the requirements of Title 68 of the Indiana Administrative Code. As reviewed prior with the Union they can also contact the IGC administrative office if they have additional questions. Note ***this process is required by***

> ***our regulators*, it's not ours, and we have to follow the rules and regulations of the IGC at Horseshoe Indianapolis.** Jx. 3. Emphasis in original.
>
> The Union then submitted the Grievance to arbitration. Jx. 4.

International Union Vice-President and Business Agent [B]

International Union Vice-President and Business Agent [B] has worked for the International Union for approximately 23 years. At Horseshoe, Mr. [B]e needs an escort. This could be the Union Committee person. The Committee person at Horseshoe is [E]. Mr. [E] would be on the clock. Mr. [B]e would go through Security. HR is contacted. The Committee person meets them at the desk. Meal time is paid time.

Employer Regional Compliance Director [C]

Employer Regional Compliance Director [C] has worked at Horseshoe for seven years. Mr. [C] was not involved with the CBA negotiations. The Employer has regulatory compliance obligations with IGC. There are a squad of onsite IGC agents at Horseshoe. This is 24/7.

Visitors and vendors are required to check in and be issued a badge. Internal control procedures are required. Rx. 101. The Internal Control Procedures document says, in part, “All visitors entering the Casino will be required to be escorted by a representative from the Casino.” *Id.*, p. 1-63.

The IGC control procedures differ from property to property in Indiana. There are riverboat, racing, and other type properties. If there were a violation, there can be civil penalties. Before the CBA, the Employer asked the IGC how the Employer could handle Union access to Horseshoe. Rx 102. There was an email from the IGC. Mr. [C] does not know if the email was sent to the Union. June 2021. Rx 103.

In June 2021, after the CBA was ratified but before it was finalized, Mr. [C] contacted the IGC and asked whether Union representatives could be badged as vendors under the Employer's Facility Access Procedure. The IGC said no. The IGC informed [C] that “[s]tandard IGC protocols would require a visitor badge in this situation. The vendor badge is not applicable.” Rx. 102.

In July 2021, Mr. [C] again contacted the IGC to seek permission to deviate from its standard visitor access protocol under the Facility Access Procedure when Union representatives visited the Casino. Rx. 103. He explained:

> For the first time in [the Employer's] history the property has several departments that include employee's represented by labor unions, Unite Here and the Teamsters. Each union has representatives that regularly visit the property to meet with their members. At the present time each time the Union reps visit the property, we issue them visitor badges and escort them throughout their visit to the property, with the primary escorts being HR and Security personnel. The visits by the union reps typically last several hours, and consume a good portion of the work day for the HR or Security personnel assigned to escort.
>
> We anticipate that the union reps will be visiting [the Casino] for many years to come, therefore if its permissible we would like to explore any available options that there might be as far as issuing the reps permanent badges that would allow them to move in the non-sensitive areas of the property unescorted. Ultimately we would like to accommodate the representation needs of the union and their members, but also ensure that our staff resources aren't overly consumed when the reps visit [their] members on property. *Id.*, p. 3.

In August 2021, the IGC's Gaming Administrator responded to this request by granting the Employer some leeway to deviate from the Facility Access Procedure when Union representatives visited the property. The IGC stated:

> The IGC is willing to allow the union representatives the ability to not be escorted if they are staying in the same location on property. [The Employer] should notify onsite IGC upon arrival of the reps, have them use a visitors badge, and the individuals will then need an escort to the designated meeting area. Any movements from the original location will need to be escorted, and as stated previously, they are not allowed access to sensitive areas or any areas of the property that require swipe access.
>
> Please let me know if [the Employer] is agreeable with this course of action. Additionally, local IGC will be monitoring for any issues and if any occur this relief may be rescinded by the IGC. *Id*., p. 1.

The IGC approved a deviation concerning Union access to Horseshoe. The Union representative could be escorted to a designated meeting area. There were notice requirements. These access deviation terms were communicated to the Union. Rx. 104. The Union did not sign. But those terms were followed. There would be contact with HR to set up meeting times. HR would provide notice to the onsite IGC agents. If the Union deviated, Mr. [C] would have to deal with the issue.

CBA signed. Sec 4.02, p 1.6.

According to Mr. [C], the IGC has no problem with night or weekend visits.

HR Manager [D]

HR Manager [D] has been employed with Horseshoe since October 2015. Ms. [D] interacts with the Union. Ms. [D] received a copy of the Rx. 103 email chain documents because she is a part of HR. Advance notice by the Union was important. The Employer had to tell IGC.

The Employer followed the terms in the September 30, 2021, email. Rx. 104. The Union representative arrives. The representative gets a visitor badge. The representative would be escorted to the designated area. The majority of the time the escort would be from HR. Sometimes the escort would be a Union Steward. The escort would have to be someone in the unit. According to Ms. [D], an employee on the clock can be an escort if it does not interfere with the employee's work. During HR hours, HR would provide an HR escort. According to Ms. [D], communication to the IGA does not have to come from HR.

CONTENTIONS OF THE PARTIES

a. For the Union

The Union contends that this case is not about whether the CBA's provision giving Union representatives access to the workplace must be interpreted to allow compliance with the IGC's formal or informal rules. The Union is willing to comply with the conditions that an IGC agent instructed the Employer to follow, even though the Employer or, when referring to the property, the Casino, did not bargain for such conditions. *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 767-70 (1983) (employer liable for breaching CBA, even when CBA conflicts with another important public policy). This case is about whether the Employer may unilaterally impose two additional conditions for its own convenience. There are several reasons why the Employer may not impose either of those conditions: they are not found in the CBA text; they are not practical; they are unnecessary; and they unfairly burden the Union more than the other unions covered by the same CBA.

According to the Union, neither party bears the ultimate burden of proof in this case. This case is not about compliance with Indiana law. The Employer has limited the Union's access to the Casino in ways that the CBA does not permit. The CBA does not limit the times of the day or the days of the week that Union representatives may exercise Art. 4.02 rights. The CBA does not place conditions on Union access to the Casino on Union

representatives' ability to locate off-duty employees to escort them. It is of no importance that the Union filed the grievance in 2023.

The Union requests that an award be issued that directs the Employer to cease and desist from (a) limiting the days of the week and the times of the day that the Union's representatives may exercise their access rights under Art. 4.02; and (b) requiring that the Union arrange for an off-duty employee to escort the Union's representatives when the Union's representatives seek to exercise their access rights under Art. 4.02. The Union further requests that I retain jurisdiction over the implementation of this remedy for six months from the date of the award.

According to the Union, I should conclude that the Employer is violating Art. 4.02 (1) by limiting the Union's access to certain days of the week and times of the day; and (2) by requiring the Union to arrange for an off-duty employee to escort the Union representative.

b. For the Employer

The Employer contends that this is a straightforward contract interpretation case in which the material facts are undisputed. In 2021, the Employer and the Union were finalizing their first CBA, which includes terms in Art. 4.02 that give Union representatives certain rights to access the Employer's property and impose certain limitations on those rights. As the Employer operates under the rules and regulations of the IGC, in mid-2021 the Employer requested that the IGC exempt Union representatives from its standard visitor badging and access requirements. The IGC denied that request, but it approved certain limited deviations from the Employer's standard visitor access requirements during visits by Union representatives.

The Employer informed the Union of those IGC-approved access requirements, and it also explained that, when a representative intended to visit, they needed to provide advance notice to Human Resources and visit at a time when someone from HR was present. This was important because the IGC requires each Union representative to be escorted during their visits, and as HR was responsible for managing the Employer's relationship with the Union, HR had to arrange for an escort and notify IGC's on-site enforcement agents. No Union representatives objected to these directives, and for approximately 18 months thereafter, Union representatives complied with them each time they visited the Casino.

In April 2023, the Union did an about-face and claimed that these access terms violate Art. 4.02. That claim fails on several fronts. For starters, nothing in Art. 4.02 states the days or hours when the Employer is required to permit the Union to exercise its visitation rights, and the Employer has shown that it has permitted Union representatives with access to its property in accordance with the plain language of Art. 4.02. Moreover, Art. 4.02 expressly states that the Union's “visits shall not interfere with the operation of [the Employer's] business” and shall not “otherwise disrupt [the Employer's] operations,” which is precisely what the adopting the Union's interpretation of Art. 4.02 would do. Finally, even if going beyond the CBA's plain language, the Union's claim runs contrary to the parties' established practice, which has occurred both before and after the CBA was finalized. The Employer has presented uncontroverted evidence showing that it applied the language of Art. 4.02 on dozens of occasions precisely in the way the Union now claims violates that Article. The Union cannot meet its burden of proof to show that its position is supported by the language of the CBA and that the CBA has been violated.

The Employer requests that I deny the grievance.

DISCUSSION AND DECISION

The instant case involves a contract interpretation in which I am called upon to determine the meaning of some portion of the CBA between the parties. I may refer to sources other than the CBA for enlightenment as to the meaning of various provisions of the CBA. My essential role, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed provisions of the CBA. Indeed, the validity of the award is dependent upon my drawing the essence of the award from the

plain language of the CBA. It is not for me to fashion my own brand of workplace justice nor to add to or delete language from the CBA.

In determining the meaning of the instant CBA, then, I draw the essence of the meaning of the CBA from the terms of the CBA of the parties. Central to the resolution of any contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, I will first examine the language used by the parties. If the language is ambiguous, I will assess comments made when the bargain was reached, assuming there is evidence on the subject. In addition, I will examine previous practice by the parties related to the subject. When direct evidence is not available, circumstantial evidence may be determinative.

This is a contract interpretation case. The basic issues are whether the Employer violated Art. 4.02 by (a) limiting the days of the week and hours of the day that Union representatives may access nonpublic areas of the Casino; and (b) by requiring the Union to arrange for an off-duty employee to escort the Union representative? The Union maintains that the Employer violated the CBA. The Employer maintains that it did not violate the CBA.

Burden of proof

The Union argues that it does not bear the burden of proving that its interpretation of Art. 4.02 is correct. The Employer argues that the Union bears the burden of proof.

The Union bears the burden of proof in this CBA interpretation case. Elkouri & Elkouri, How Arbitration Works (8th ed.), pp. 8-104 to 8-107. The burden lies with the Union to identify a CBA provision which prohibited the Employer from acting as it did. Abrams, Inside Arbitration, pp. 246-247 and 301-303.

Negotiations

There is no relevant CBA negotiating history concerning the issue in this case. The issue has to be resolved from the words within the CBA and the totality of the circumstances. Elkouri & Elkouri, pp. 9-26 to 9-31.

General overview

The CBA says:

ARTICLE 4: COUNCIL REPRESENTATIVES

> ***4.01. Council Representatives.***
>
> The Union shall have the right to designate any employee as a Union Steward in any department or any shift employing its members. … **Union business, including grievance handling, shall be conducted by Union members, employees, and Stewards on their own time or at mutually agreeable times and places.** … **The activities of the Steward shall not interfere with the performance of their work for, or the operation of, the Employer.** ….
>
> ***4.02. Access to Employer Property.***
>
> Authorized representatives of each Union shall have the right to visit the **employer's establishment** for the purpose of communicating with bargaining unit employees and supervisors regarding **Union business** and collecting Union dues, assessments, initiation fees, and other fees. **Such visits shall not interfere with the operation of Employer's business or the performance of work by employees during their working time.**
>
> (a) *Visitation Rights.* Each Union shall designate in writing to the Employer the names of the authorized representatives who may exercise the Union's visitation rights.

(b) *Designated Areas.* The designated Union Representatives shall have access **to areas where bargaining unit employees are working** for the purpose of observing matters relevant to the investigation of grievances. The designated Union Representative shall **also** have access to the employee cafeterias and break areas in order to conduct Union business.

(c) *Work Interference.* **Access shall not interfere with the work of any employee or guest's activities or otherwise disrupt the Employer's operations.**

(d) *Sign In.* Council Representatives when preapproved by the Company shall be furnished ID badges that grant them access to Employer property for the purposes of contacting bargaining unit employees. …. CBA, pp. 6-7.

ARTICLE 18: GRIEVANCES AND ARBITRATION

18.03. Procedure for Adjusting Grievances.

… The decision of any arbitrator shall be final and binding upon the parties. An arbitrator shall only have the power and authority to interpret and apply the provisions of this Agreement to the grievance presented, and his decision shall apply only to the issue arising out of the facts of such grievance. **The arbitrator shall have no authority to alter, amend, modify, nullify, ignore or add to the provisions of this Agreement either by implication or otherwise.** …. CBA, pp. 32-33. Emphasis added.

"Ordinarily, all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning …." Elkouri & Elkouri, p. 9-36.

All of the witnesses testified honestly and to the best of their recollections. The good faith testimony of the witnesses does not resolve the questions before me.

All words used in a CBA should be given effect. *Id*, pp. 9-34 to 9-35.

The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. *Riley Stoker Corp*, 7 LA 764, 767 (Platt, 1947).

If CBA wording is clear and definite, clear language should be enforced. In cases where the language is clear and unambiguous, arbitrators are generally unlikely to consider extrinsic forms of evidence such as the intent of the parties, bargaining notes or history, or practices. *Champion Int'l Corp*., 85 LA 877, 880 (Allen, 1985). Words should be given their ordinary and popularly accepted meaning in the absence of anything indicating that they were used in a different sense or that the parties intended some special or technical meaning.

It has been indicated that:

Although [I] may use [my] expertise in interpreting and applying the contractual provisions, [I] cannot substitute [my] own sense of equity and justice but the award must be grounded in the terms of the agreement. To do otherwise would, in effect, be to change or alter the agreement through indirection. This [I] cannot, and should not do in the interest of *all* parties and the collective bargaining process. In

> other words, it is the [my] duty … to interpret the contract as precisely as [I] can, and not to rewrite it. *Johnston-Tombigbee Mfg Co*., 113 LA 1015, 1020 (Howell, 2000).

I interpreted and applied the CBA provisions and did not add to, subtract from, modify, or delete any of its provisions.

I gave full and careful consideration to the general principles of contract interpretation and the entire record, including the credibility of the witnesses, the CBA, the exhibits, and all arguments.

Can the Employer limit the days of the week and hours of the day that Union representatives may access nonpublic areas of the Casino?

The Union argues that the Employer cannot limit the days of the week and hours of the day that Union representatives may access nonpublic areas of the Casino.

The Employer argues that the Employer can limit the days of the week and hours of the day that Union representatives may access nonpublic areas of the Casino.

I find that the Employer cannot limit the days of the week and the hours of the day that Union representatives may access nonpublic areas of the Casino.

The Employer is not permitting Union representatives to access the Casino after 4:30 p.m., before 8:30 a.m. or at any time on Saturdays and Sundays. The Employer's rationale for so limiting the Union representatives is that the Employer is required to notify the IGC representatives who are stationed at the Casino that a Union representative will visit; the Employer has assigned this task to HR; and HR works only between 8:30 and 4:30 on Mondays through Fridays.

Art. 4.02 does not contain any limit on the days of the week or the times of the day that Union representatives may access the Casino. The CBA does not authorize the Employer to impose rules about the timing of Art. 4.02 access rights. I “have no authority to alter, amend, modify, nullify, ignore or add to the provisions of this Agreement either by implication or otherwise.” Jx. 1, pp. 32-33.

While the IGC requires that the Employer notify it of a Union representative's visit, the IGC does not require that HR do so. A manager, security guard, or another employee may do so.

The Internal Control Procedures document does not limit the days or time of Union representative visitations. Rx. 101. The Employer's Enhanced Access document does not limit the days or time of Union representative visitations. Rx. 104.

The IGC does not require the Employer to provide notice precisely at the time that a Union representative arrives. The IGC allows the Employer to give notice in advance that a Union representative will be arriving at some point in the future. HR gives the IGC representatives notice hours or days in advance of when the Union representatives will be at the Casino.

On March 21, 2022, HR notified the IGC that a Union representative would be at the Casino four days later on March 25, 2022. Rx. 105, at 1. On May 4, 2022, HR notified the IGC that a Union representative would be at the Casino the next day, without stating the time that the Union representative would arrive. *Id*., at 2. On May 10, 2022, HR notified the IGC that a Union representative would be at the Casino two days later on May 12, 2022, again without stating the time that the Union representative would arrive. *Id*., at 3.

At the Employer's request, the Union representatives provide HR with advance notice of when they will be coming to the Casino. Rxs. 105 and 111.

The unit employees work all days of the week, and all hours of the day and night.

The outdoor smoking area is not a satisfactory alternative. Not all employees use the smoking area. There are weather situations. Employees might not want to sit outside at night.

Can the Employer require the Union to arrange for an off-duty employee to escort the Union representative?

The Union argues that the Employer violated CBA Art. 4.02 by requiring the Union to arrange for an off-duty employee to escort the Union representative. An agent of the IGC decided that a Union representative must have an employee escort when the representative moves about the nonpublic areas of the Casino. The Union objects that the Employer does not provide the escort. The Union further contends that it is very difficult for the Union to provide its own escort. It must locate a Casino employee who is not working and persuade that employee to come to the Casino on the employee's time off. When the Union representative wishes to visit on the overnight shift to talk to employees who work at that time, the representative will have to convince an off-duty employee to leave home to assist the representative. Escorting the Union representative from one place to another takes only a few minutes at a time, but the representative cannot allow the off-duty employee escort to leave because the representative will not have an escort if the representative needs to go to another area of the Casino or when the representative is ready to leave. The Employer could allow an employee who is at work to serve as the escort, whether the employee is in the bargaining unit, a security guard, or a manager. An employee could be summoned to escort the Union representative from one place to another and then return to what he or she was doing. It is not the Union or the CBA that requires Union representatives to be escorted. Escorting the Union representative is not “union business.” It is part of running the Employer's operations to the IGC's satisfaction, and doing so should not be deemed to disrupt the Employer's operations.

The Employer argues that the Employer denying Union representatives access unless accompanied by an off-duty employee does not violates Art. 4.02. According to the Employer, Art. 4.02, after outlining the Union's general right to access the Employer's property, states that “ **[s]uch visits shall not interfere with the operation of Employer's business or the performance of work by employees during their working time.**” *Id*. Emphasis added by Employer. Art. 4.02(c), which is titled “Work Interference,” reiterates that a Union representative's “ **access shall not interfere with the work of any employee or guest's activities or otherwise disrupt the Employer's operations.**” Jx. 1, p. 7. Emphasis added by Employer. The position the Union advances that it should be permitted to access the Casino with any badged escort of its choosing, would result in precisely the type of interference and disruption this language prohibits. According to the Employer, interpreting Art. 4.02 to require that the Employer assign an employee who is on working time to escort Union representatives during their visit means an employee would have to depart from their assigned job duties and tend to the Union's visit. Imposing this escort requirement would “interfere with the operation of Employer's business” and “otherwise disrupt the Employer's operations,” which Art. 4.02's first paragraph and Art. 4.02(c) explicitly prohibit. To the extent the Union claims that Art. 4.02 requires that the Employer assign an employee who is on working time to escort Union representatives during their visit, that position would result in violating Art. 4.01's clear statement that “Union business … shall be conducted by Union members, employees, and Stewards on their own time or at mutually agreeable times and places.” Jx. 1, p. 6.

I find that the Employer violates Art. 4.02 by requiring the Union to arrange for an off-duty employee to escort the Union representative.

The Internal Control Procedures document provides, in part, “All visitors entering the Casino will be required to be escorted by a representative from the Casino.” Rx. 101, p. 1-63. The Enhanced Access document provided by the Employer to the Union provides “All representatives are required to be escorted by authorized Indiana Grand personnel …. Any movement from the pre-approved designated location will require … an escort from authorized Indiana Grand personnel.” Rx. 104. Neither document requires that the Union provide the IGC required escorts.

The requirement of an escort for the Union representative visits is an obligation imposed by the IGC on the Employer. The providing of an escort is Employer business, not Union business. I am making this decision based on what the parties agree is clear and unambiguous CBA language and the evidentiary record in this case.

Southern Casino

The Employer contends that the Southern CBA is irrelevant to resolving the Grievance before me. It would appear that the Union did not mention Southern in its Post Hearing Brief. I have not considered Southern in deciding this case.

Acquiescence and continuing violation

The Employer argues that, over the course of over a year and a half, the Union acquiesced to the Employer's access terms repeatedly, without levying any objection whatsoever despite having ample knowledge of those terms, and even if the language of Art. 4.02 were found to be ambiguous, that ambiguity should be resolved in favor of the Employer's past interpretation and application and the Grievance should be denied. This argument does not control. Art. 4.02 is not ambiguous. “In the present dispute, the applicable language is in Art. 4.01 and 4.02 of the CBA, and that language is unambiguous.” Employer Post Hearing Brief, pp. 14-15. The parties stipulated that the case is properly before me. The Employer waived any timeliness defense by not raising it in the grievance process. The violations about which the Union complains are continuing ones for which the Union seeks only a prospective remedy. “Many arbitrators have held that ‘continuing’ violations of the agreement (as opposed to a single isolated and completed transaction) give rise to ‘continuing’ grievances in the sense that the act complained of may be said to be repeated from day to day, with each day treated as a new ‘occurrence.’” Elkouri & Elkouri, p. 5-30. Grievances in such cases may therefore be filed at any time, although back pay can be limited in some cases to amounts accrued since the date of filing. *Id*. Nolan, *Labor and Employment Arbitration* (1998), p. 301 (“Some … arbitrators believe that alleged breaches with continuous or recurring effects give rise to a new grievance with every application.”).

RELIEF

The Union requests that I issue an award that directs the Employer to cease and desist from (a) limiting the days of the week and the times of the day that the Union's representatives may exercise their access rights under Art. 4.02; and (b) requiring that the Union arrange for an off-duty employee to escort the Union's representatives when the Union's representatives seek to exercise their access rights under Art. 4.02. The Union further requests that I retain jurisdiction over the implementation of such remedy for six months from the date of the Award.

The Employer requests that I deny the Grievance in its entirety. The Employer further requests that in the event that the Grievance is not denied in its entirety and I grant the Grievance, to ensure compliance with the terms of the Employer's IGC-approved Facility Access Procedure for Visitors and the IGC's August 2021 email permitting certain limited deviations from those terms for Union representatives, the last paragraph in the Award should state comprehensive language to that effect which is suggested at Employer Post-Hearing Brief, pp. 23-25.

My authority to fashion an appropriate remedy includes ordering a party to cease and desist from continuing to do the act that I have ruled to be in violation of the CBA. I may include injunctive-type relief in the award. Elkouri & Elkouri, pp. 18-11 to 18-13. The default remedy in a CBA violation case is an order directing the employer to stop doing what it is doing in violation of the CBA. Abrams, p. 183.

The Employer is ordered to cease and desist from (a) limiting the days of the week and the times of the day that the Union's representatives may exercise their access rights under Art. 4.02; and (b) requiring that the Union arrange for an off-duty employee to escort the Union's representatives when the Union's representatives seek to exercise their access rights under Art. 4.02.

The remedy does not include language “to ensure compliance with the terms of the Casino's IGC-approved Facility Access Procedure for Visitors and the IGC's August 2021 email permitting certain limited deviations from those terms for Union representatives ….” Such language would be inconsistent with the statement of the issue, the scope of the Grievance, and the CBA provision that I “have no authority to alter, amend, modify, nullify, ignore or add to the provisions of this Agreement either by implication or otherwise ….”

CONCLUSION

The crucial points in this case include:

1. I “have no authority to alter, amend, modify, nullify, ignore or add to the provisions of this Agreement either by implication or otherwise;” Jx. 1;
2. the clear and unambiguous language of Art. 4.02 does not place day or time limitations of when Union representative visits can be made;
3. the clear and unambiguous language of Art. 4.02 does not require that the Union arrange for an off-duty employee to escort Union representatives when the representatives seek to exercise their access rights under Art. 4.02;
4. clear and unambiguous language is interpreted consistent with the parties' intent as reflected by clear and explicit terms;
5. ordinary meaning given to words unless they are clearly used otherwise;
6. the totality of the circumstances; and
7. the wording of the CBA.

This decision neither addresses nor decides issues not raised by the parties.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I grant the Grievance.

The Employer violated CBA Art. 4.02 by limiting the days of the week and hours of the day that Union representatives may access nonpublic areas of the Casino.

The Employer violated CBA Art. 4.02 by denying Union representatives access unless the Union arranges for an off-duty employee to escort Union representatives when the representatives seek to exercise their access rights under Art. 4.02.

I retain remedial jurisdiction over this matter for sixty days from the date of this Award for the sole purpose of resolving any questions that may arise over application or interpretation of a remedy. *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, Part 6, Section E. Elkouri & Elkouri, pp. 7-49 to 7-54.